



FH

**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

CWK/148014

PRELIMINARY RECITALS

Pursuant to a petition filed March 14, 2013, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Bureau of Long-Term Support in regard to Medical Assistance, a hearing was held on June 28, 2013, at Waukesha, Wisconsin. At the hearing, it was decided that the issue of the adequacy of the agency's notice to the Petitioner would be decided based on briefs from each party. The hearing was adjourned and a briefing schedule was established. On July 15, 2013, the Petitioner's representative filed its initial brief with DHA. On July 25, 2013, the agency's representative filed a response brief.

The issue for determination is whether the agency provided adequate and proper notice to the Petitioner regarding the termination of music therapy services.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

Attorney Shirin Cabraal
6737 W. Washington Street #3230
Milwaukee, WI 53214

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703

By: Attorney Deborah Price
Waukesha County DHHS
500 Riverview Dr.
Waukesha, WI 53188

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Waukesha County.
2. Petitioner is an 11 year old with a primary diagnosis of autism. He receives services under the Children's Long Term Services (CLTS) waiver. He has been receiving music therapy services as part of his individual service plan (ISP) through the waiver since at least February, 2012.
3. In or about November, 2012, the Wisconsin Department of Health Services instructed counties to discontinue using CLTS waiver funds for music therapy because it was not recognized as an "evidence-based therapy." It further instructed counties to discontinue services to recipients at the time of their next six month review.
4. On December 5, 2012, the county agency conducted the Petitioner's 6 month review. The ISP developed as a result of the review included 30 minute music therapy sessions 2x/week until January 31, 2013.
5. On December 19, 2012, the county agency issued a Notification of Service Denial to the Petitioner informing him that Music Therapy services would be discontinued as part of the waiver program effective January 31, 2013. It noted the reason for the denial as follows:

"CLTS waiver agencies have been informed Music Therapy is no longer a Waiver allowable service. Reason being, at this point there is no independent peer reviewed research published in referee journals that demonstrates the efficacy of the treatment approach with targeted populations (children with Developmental, Physical and social Emotional Disabilities)."

The notice also contained the following language:

"State notice requirements and appeal process:

1. You have the right to a written notice, at least 10 days in advance, any time your waiver services are to be reduced or terminated."
6. On February 1, 2013, the Petitioner's music therapy services were discontinued.
7. On February 8, 2013, the county agency was notified of the following via email from DHS:

"Please be aware that until further notification, decisions related to funding music therapy services under the CLTS waivers and the Family Support Program are on hold pending additional review.

At this time services may continue, and you can contact individual children's music therapy providers to re-authorize approved treatment services.

If you have questions please contact your Children's Services Specialist."
8. On March 7, 2013, the county agency issued a Notification of Service Denial to the Petitioner. It informed Petitioner that music therapy is denied effective January 31, 2013. The following language was provided as a basis for the denial:

"You have previously received a letter similar to this one indicating that the Wisconsin Department of Health services (DHS) was disallowing the funding of Music Therapy as it was considered an 'experimental treatment' that could not be funded by the Waiver. DHS has since lifted that disallowance while it continues its review and determination of the ability of Waiver funding to pay for Music Therapy. While that is

occurring, Waukesha County has clarified its policy on Music therapy. Per waiver regulations, any ‘therapy’ must be conducted by a credentialed practitioner in that field for a ‘therapeutic benefit with an identified therapeutic outcome.’ Based on the parents’ goals for [Petitioner] and reports from his Intensive Autism Therapy provider and Music Therapy reports it has been determined that [Petitioner] does not have a therapeutic need for Music Therapy and there have been no identified therapeutic benefits to him from his involvement in Music Therapy. Therefore Waukesha County will not reinstate funding for Music therapy for [Petitioner].”

The notice also contained the following language:

“State notice requirements and appeal process:

1. You have the right to a written notice, at least 10 days in advance, any time your waiver services are to be reduced or terminated.”
9. On March 14, 2013, the Petitioner filed an appeal with the Division of Hearings and Appeals.
10. On March 15, 2013, DHA ordered the agency to restore the Petitioner’s benefits retroactive to January 31, 2013 pending a hearing decision.
10. On March 19, 2013, the county agency issued a letter to the Petitioner informing him that the agency will “continue to pay for Music Therapy for [Petitioner] until a final Appellate Decision is reached.”

DISCUSSION

The Petitioner argues that the agency’s March 7, 2013 notice terminating the Petitioner’s music therapy services is inadequate for several reasons:

1. The effective date on the notice was retroactive to January 31, 2013;
2. The notice failed to provide the specific regulations to support the termination;
3. The notice failed to provide an explanation under which services can be continued if a hearing is requested.

The Division of Hearings and Appeals has a long-standing policy, based upon the seminal United States Supreme Court decision Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011 (1970), that notices denying public assistance benefits, including MA and MA waiver benefits, must meet basic due process requirements. See DHA Decision Nos. CCB-40/80982, FOS 145483, MPC 13/84362, MBC 40/100648, MPC 13/100495, FCP 116377, MED 67/70504, CCB 40/722283, FOO-30/75065, FWP 40/73130, MCW-40/70157 and FOO 40/79197. Benefits are subject to the constitutional due process “restraints” set forth in Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L.Ed.2d 287 (1970). These “restraints” “require, among other things, that a recipient have meaningful, timely and adequate notice detailing the reasons for a proposed termination” of benefits, 397 U.S. at 268-9. To be meaningful, the notice must be provided at, or very near the time the action is to be taken. See Vargas v. Trainor, 525 F. 2d 837 (7th Cir. 1975).

In accordance and consistent with Goldberg v. Kelly, federal and state regulations and policies require **advance** notice of termination of public assistance benefits. Before taking a negative action against a person's ongoing MA or MA waiver benefits, the agency issue timely advance, adequate written notice of the discontinuance. 42 C.F.R. 435.919(a) and 42 C.F.R. 431.210. The State or local agency must mail a notice at least 10 days before the date of action, except as permitted under §§ 431.213 and 431.214 of this subpart. 42 CFR § 431.211 The exceptions under §§ 431.213 and 431.214 are not applicable here.

The agency's Income Maintenance Manual states as follows:

Provide adequate notice at least 10 days before the effective date of any intended adverse action. The length of the notice depends on the circumstances of the action and case.

In no case is notice timely, if provided after the action's effective date.

Income Maintenance Manual § 3.2.3.

The controlling federal regulation stating the required elements of a Medicaid notice of any negative action taking against a Medicaid recipient. The federal regulation states, in the part relevant here, as follows:

§ 431.210 Content of notice.

A notice required under § 431.206(c)(2), (c)(3), or (c)(4) of this subpart must contain—

- (a) A statement of what action the State, skilled nursing facility, or nursing facility intends to take;
- (b) The reasons for the intended action;
- (c) The specific regulations that support, or the change in Federal or State law that requires, the action;
- (d) An explanation of—
 - (1) The individual's right to request an evidentiary hearing if one is available, or a State agency hearing; or
 - (2) In cases of an action based on a change in law, the circumstances under which a hearing will be granted; and
- (e) An explanation of the circumstances under which Medicaid is continued if a hearing is requested.

42 C.F.R. §431.210.

In the instant case, a review of the adverse notice provided to Petitioner on March 7, 2013 reveals that it was neither timely nor adequate. The notice, which terminated music therapy services effective January 31, 2013, was dated 35 days after the effective date of termination. Further, it contained no citations to federal or state law or regulation to support its action.

The agency asserts that the notice was adequate because it was a “continuation” of the December 19, 2012 denial of Petitioner's service. This argument is without merit. The only basis for termination of the Petitioner's music therapy in the December 19, 2012 notice was the state's determination that the service was experimental. On or about February 8, 2013, the state determined that this was no longer a valid basis for denial and instructed counties to reinstate services. At that time, the agency was required to reinstate the service until it made a new determination with a different basis and issued a new and proper notice with citation to regulations upon which it relied and an effective date of termination at least 10 days from the date of the new notice. The notice of March 7, 2013 contained an improper retroactive date of termination and contained no citation to the laws, regulations or policies upon which it relied for its determination. The only reference in the notice for the basis of the determination was “waiver regulations.” The March 7, 2013 does not comply with basic due process requirements and is *void ab initio*.

CONCLUSIONS OF LAW

The March 7, 2013 notice of termination of the Petitioner's music therapy was not a proper and adequate notice. Therefore, it is void ab initio.

THEREFORE, it is

ORDERED

That the matter is remanded to the agency with instructions to rescind the termination of the Petitioner's music therapy services; restore his eligibility for such services retroactive to January 31, 2013 and continue his eligibility for so long as he is otherwise eligible. These actions shall be completed within 10 days of this Decision.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

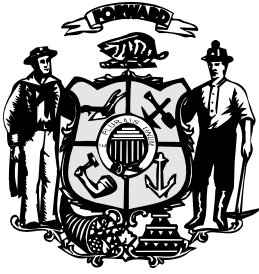
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 2nd day of August, 2013

\sDebra Bursinger
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Wayne J. Wiedenhoeft, Acting Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on August 2, 2013.

Bureau of Long-Term Support
shirinc@drwi.org
dprice@waukeshacounty.gov